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(2)

Supreme Court, U.S.
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No. 91-52

In The

Supreme Court of the United States

October Term, 1991

CHARLES FRUHWIRTH,

Petitioner,

v.

BALTIMORE CITY POLICE DEPARTMENT

and

EDWARD V. WOODS, COMMISSIONER,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of Maryland, filed on May 25, 1990, was not reported. That opinion and that Court's order are reproduced in the appendix of the petition for writ of certiorari at page 4a.

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit, dated April 25, 1991, is reproduced in the appendix of the petition at page 1a.

STATEMENT OF THE CASE

The Respondent notes that the statement of operative facts in the Petition is basically drawn from the complaint filed in this case. A transcript of the telephone conversation between Officer Fruhwirth and Cadet Thompson was included in the Defendants' Memorandum in Opposition to Motion for Injunctive Relief and is included herein at App. 1.

On August 15, 1988, at 2:09 p.m., Officer Fruhwirth received and signed for a paper entitled "Notification to Accused of Complaints." This paper was given to Fruhwirth by the Internal Investigation Division as part of its routine for handling complaints and investigations. This document informed Fruhwirth of the nature of the complaint as follows:

> "It is alleged that on 13 Aug 88, while having a telephone conversation with Cadet Danier Thompson, communications division, you used profanity and racial slurs. This occured [sic] after you identified yourself as a police officer."

This Notification was given to Fruhwirth two days after the incident occurred and over a year before Fruhwirth filed his complaint in the district court. The text of the Notification to Accused of Complaints is included herein at App. 3.

REASONS FOR DENYING THE PETITION

The Petitioner presents for review a question which does not involve any special or important issues which would justify the issuance of a writ of certiorari. The decision of the Court of Appeals implicates none of the traditional grounds for certiorari jurisdiction. It does not conflict with decisions of other Courts of Appeals on the same subject; and it does not involve an important question of federal law which has not been, but should be, decided by this Court.

It should be noted that the Court of Appeals did not consider its decision to be of sufficient import to publish it. This means that the Court of Appeals' opinion did not satisfy any of that Court's standards for publication:

> "i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or
>
> ii. It involves a legal issue of continuing public interest; or
>
> iii. It criticizes existing law; or
>
> iv. It contains an historical review of a legal rule that is not duplicative; or

> v. It resolves a conflict between panels of this Court or creates a conflict with a decision in another circuit."

Internal Operating Procedures, 4th Cir., IOP 36.4. This also means that the decision has very little precedential value, if only because very few people will ever be able to read the opinion. Thus, its import on litigation on a national scale or even on a local scale will be minimal. Similarly, the district court's memorandum opinion was not published and for the same reasons it will not have an effect beyond this case.

More importantly, however, the Petitioner's argument is based on an erroneous statement of fact. When that statement is corrected, this case resumes the posture of an "average" abstention case which was correctly decided below and which does not merit consideration by this Court.

A. The Petitioner's argument is premised on an erroneous statement of fact as to the Petitioner's knowledge of the administrative proceedings.

The argument presented by the Petitioner is based solely on his lack of knowledge of the investigation prior to his being served with formal charges. Indeed, Fruhwirth states that he was

> " . . . denied any knowledge of the allegations asserted against him. Fruhwirth was not aware of the allegations asserted against him, or of the investigation conducted by IID, until the time he was served with departmental charges."

Petition, page 8.[1] Thus, Fruhwirth argues that because he had no knowledge of the charges, the district court should have entertained his challenge, which was filed shortly after service of the formal charges.

The most obvious problem with this argument is that it is a misstatement of fact. As a routine matter of procedure, the Internal Investigation Division (IID) notifies an officer when a complaint has been lodged against that officer. This is done by serving on the officer a form entitled "Notification to Accused of Complaints," for which the accused officer signs to evidence receipt.

On August 15, 1988, at 2:09 p.m., Officer Fruhwirth signed and received a Notification to Accused of Complaints, which informed him of the general nature of the complaint as follows:

> "It is alleged that on 13 Aug 88, while having a telephone conversation with Cadet Danier Thompson, communications division, you used profanity and racial slurs. This occured [sic] after you identified yourself as a police officer."

App. 3.[2]

It should be noted that this notification of the complaint and investigation was given to Fruhwirth only two days after the incident occurred. Thus, Fruhwirth knew

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[1] In the Complaint filed in the district court, there was no allegation as to when Fruhwirth became aware of the misconduct complaint and investigation.

[2] The Notification was not a part of the record below because Fruhwirth never before raised the precise issue of his knowledge of the complaint and investigation.

of the complaint, the nature of the accusation and the existence of the IID investigation for a full year prior to when he now claims in his Petition to have received his first knowledge of the complaint and investigation. Accordingly, he had a year within which to bring an action in the district court, had he wished to do so.

In *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225 (4th Cir. 1989), cited by the Petitioner, the Fourth Circuit opined that "the period between the threat of enforcement and the onset of formal enforcement proceedings may be an appropriate time for a litigant to bring its first Amendment challenges in federal court." 885 F.2d at 1229. In this case, Fruhwirth had a year-long period before he was served with formal charges; he could have used this time to bring his challenge in federal court as in *Telco, supra*.

It is clear, then, that the Petitioner's whole argument is based on an erroneous statement of fact. In attempting to present this Court with a unique factual situation which might merit consideration by this Court, the Petitioner has, at best, forgotten the notification of August 15, 1988. Once the erroneous statement is corrected, this case simply becomes an abstention case like many others. As such, it does not warrant review by this Court.

B. The courts below correctly applied the well-established law as to the *Younger* abstention concept of "ongoing state proceeding."

Far from breaking new ground, the courts below simply applied the well-established law with respect to abstention under *Younger v. Harris*, 401 U.S. 37 (1971), and

its progeny. This Court has set forth a three-part test (with added considerations) for determining whether abstention is appropriate.

A federal court is correct in abstaining from exercising its jurisdiction if there was (1) an ongoing state proceeding (2) which implicated important state interests and (3) which provided an adequate opportunity for the federal plaintiff to raise his constitutional challenges. *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). Bad faith or harassment make abstention inappropriate. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975). Similarly, satisfaction of the three requirements will not support abstention where a statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Id.; Younger v. Harris*, 401 U.S. 37, 53-54 (1971).

In his petition, Officer Fruhwirth deals only with the question of whether there was an ongoing state proceeding. The present case, rather than presenting a unique factual setting, fits in well with a long line of cases dealing with abstention. The courts below were correct in finding an ongoing state proceeding.

Middlesex Co. Ethics Comm., supra, 457 U.S. 423 (1982), involved lawyer disciplinary proceedings. In that case, the Ethics Committee conducted an informal investigation, then a more formal one. The Committee concluded that there was probable cause to believe that the attorney had violated two disciplinary rules and the lawyer was formally charged and served with the statement of

charges. Instead of filing an answer in accordance with the bar disciplinary procedures, the attorney filed suit in the U.S. District Court. *Id.* at 428-429. That court's abstention dismissal was affirmed by this Court, which found an ongoing state proceeding. *Id.* at 433-434.

Similarly, in *Dayton Christian Schools*, 477 U.S. 619 (1986), *Younger* abstention was held proper in a case where the plaintiff brought its federal suit after the agency had initiated administrative proceedings by the filing of a formal complaint which the plaintiff answered. *Id.* at 624. Since the administrative proceeding had reached the stage of the filing of the agency's formal complaint (after an investigation), the proceeding was ongoing and this Court held that the district court should have abstained.

The same basic pattern and result are found in *University Club v. City of New York*, 842 F.2d 37 (2d Cir. 1988) In that case the city's Human Rights Commission began an informal investigation which led to the filing of a formal complaint by the commission. A formal investigation resulted in a finding of probable cause and an invitation to a conciliation meeting. When the subject club did not respond, the commission referred the case to the commission's hearings division. *Id.* at 39. After the filing of the formal complaint and during the formal investigation, the club resorted to the federal district court, which dismissed the claims on the merits. The Second Circuit, finding an ongoing state proceeding, held that the district court should have abstained under *Younger*. *Id.* at 40, 41.

The common thread running through all these cases is that the federal plaintiffs brought their actions after the

formal initiation of administrative proceedings. This was the point made by the Fourth Circuit in *Telco Communications, Inc.*, 885 F.2d 1225 (4th Cir. 1989). In that case, an investigation had taken place, followed by an informal fact-finding and settlement conference. *Id.*, 885 F.2d at 1228. The Court pointed out that the administrative agency never initiated the formal hearing process or requested a formal prosecution. Therefore, the administrative proceeding had not yet truly begun.

In the present case, however, after the initial complaint notification to Fruhwirth, and investigation, Fruhwirth was formally charged and notified of the trial board hearing date. As of that point, the administrative proceeding had officially begun and there was nothing for either party to do other than to participate in the formal hearing, which would be an adversarial proceeding involving true adjudication and thus "judicial" in nature. Clearly then, there was an ongoing state proceeding in accord with the holdings of the cases cited above. Therefore, the first prong of the test for *Younger* abstention was satisfied and the courts below ruled correctly. There is nothing in this case to warrant this Court's devoting its time and effort to a review of this case.

CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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City Solicitor

WILLIAM R. PHELAN, JR.
Senior Solicitor

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APPENDIX

(Excerpt from Defendant's Memorandum in Opposition to Motion for Injunctive Relief, filed by Respondents in the U.S. District Court.)

TIME: 11:59:20

Dispatcher Southern

Officer	Yeah, give me the Southwest dispatcher.
Officer	Come on, come on, Jesus Christ
Officer	Son of a bitches ain't saying a goddamn word and they're not talking to me on the phone, not a fricking call.
Officer	They ain't done shit with it.
Dispatcher	Hello.
Officer	Yeah, Southwest?
Dispatcher	Yes it is.
Officer	Officer Fruhwirth, Southern District
Officer	Around 11:00, I just got home my wife was telling me. I live 2600 Deleany Street, there were a couple cars out in back of the house here shining spotlights up around the area, do you know what was going on?
Dispatcher	Well I got a call out in the area, but I can't think. I can't recall what it had been, but I knew I got a call up there, but I don't [sic] what was going on. Did she see officers up around there?

Officer	Yeah, she seen all kinds of spotlights. They were shining in my back yard and everything else, I want to know what the hell's going on.
Dispatcher	Oh no, I, I can't think of what happened on the other shift you know just went off. I don't know what happened. I really, I couldn't tell you, but I know I got a call up there.
Officer	Ok.
Dispatcher	Alright, sorry.
Officer	Do you believe this shit, I know I got a call up there's but I don't know what's going on. I don't remember. Fucking asshole niggers.

App. 3

(Notification to Accused of Complaints, served on Officer Fruhwirth on August 15, 1988.)

POLICE DEPARTMENT BALTIMORE, MARYLAND

TO: Officer Charles Fruhwirth, Southern District

FROM: Director, Internal Investigation Division

SUBJECT: NOTIFICATION TO ACCUSED OF COMPLAINTS

Be advised that a complaint has been lodged concerning a situation in which you were alleged to have been involved. The nature of the complaint as it is known is as follows:

It is alleged that on 13 Aug 88, while having a telephone conversation with Cadet Danier Thompson, communications division, you used profanity and racial slurs. This occured [sic] after you identified yourself as a police officer.

You are further advised that other issues may arise concerning this complaint as the investigation progresses at which time you will be informed as to their nature.

Investigators & Assignment:

Det Paul E Murphy

_____

_____

_____

Signed and received by:
Charles K. Fruhwirth
EOD: 4/4/79 Badge No. 772
Received: Date 15 Aug 88
Time 1409

_____